Office - Supreme Court, U. S.
FILED
FEB 28 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 737

ATLANTIC COASTLINE RAILROAD COMPANY,
Petitioner,

against

SIDNEY BLUMENTHAL & COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

February 23, 1944.

SUBJECT INDEX

PAGE

Petition for writ of certiorari 1

Jurisdiction 2

Opinions below 2

Summary statement 2

Questions presented 5

Reasons for granting the writ 5

Certificate 7

Brief in support of petition 8

POINT I—The decision below that the District Court's finding of no negligence was a matter of law subject to review is in conflict with decisions of the Circuit Courts of Appeal for the Fifth, Eighth and Ninth Circuits 8

POINT II—The decision below is in conflict with decisions of the Circuit Courts of Appeal for the Third and Fourth Circuits and is also in conflict with prior decisions in the Second Circuit 11

Conflicting decisions 14

POINT III—The decision below leaves the whole industry in doubt as to its rights and obligations 20

LAST POINT—It is respectfully submitted that the writ of certiorari prayed for should be granted, that the decision of the Circuit Court of Appeals be reversed, and that the judgment of the District Court be reinstated, with costs 24

TABLE OF CASES CITED

PAGE

Andruss v. Nieto, 112 F. (2d) 250, C. C. A. 9 ..... 6, 10

Argus, The, 31 Fed. 481, D. C. Del 15

Borserine v. Maryland Casualty Co., 112 F. (2d) 409, 416, C. C. A. 8 ..... 6, 10

Bouchard Transp. Co. v. Pennsylvania R. Co., 6 F. (2d) 362, C. C. A. 2 16

Bronx Barge Corporation v. Connelly Transp. Corporation, 35 F. (2d) 294, C. C. A. 4 15

Bump, The, 56 F. (2d) 203, E. D. N. Y. 20

City of San Diego v. Perry, 124 F. (2d) 629, C. C. A. 9 ..... 6, 10

Dooley v. Pease, 180 U. S. 126 9

Eastern Glade, The, 101 F. (2d) 4, C. C. A. 2 24

Edwards v. Baltimore & O. R. Co., 131 F. (2d) 366, 368, C. C. A. 7 9

E. V. McCaulley, The, 90 Fed. 510, C. C. A. 3 14

Fidelity & Deposit Co. v. Aberdeen Nat'l Bank & Trust Co., 124 F. (2d) 973, C. C. A. 8 ..... 6, 10

Fred Smartley, Jr., The, 100 F. (2d) 971, C. C. A. 4 15

Fulton, The, 54 F. (2d) 467, C. C. A. 2 24

Hartford & New York Transp. Co. v. Rogers & Hubbard Co., 47 F. (2d) 189, C. C. A. 2, cert. denied 283 U. S. 835 17

Headlight, The, 300 Fed. 84, C. C. A. 2 19

Helvering v. Johnson, 104 F. (2d) 140, C. C. A. 8 ..... 6, 10

PAGE

Herkimer, The, 52 F. (2d) 41, C. C. A. 2, cert. denied 284 U. S. 665 18

Imoan, The, 67 F. (2d) 603, C. C. A. 2 17

Katie E., The, 46 F. (2d) 534, E. D. N. Y. 17

Mack, The, 43 F. Supp. 270, aff'd 130 F. (2d) 201, C. C. A. 2 17

McDermott v. Severe, 202 U. S. 600, 604 9

McWilliams Bros, Inc. v. Davis, 285 Fed. 312, C. C. A. 2 19

Morris & Cummings Dredging Co. v. Moran Towing & Transportation Co., 163 Fed. 610, aff'd 177 Fed. 1004, C. C. A. 2 15

National Bank v. Whitney, 103 U. S. 99, 102 24

New York Trap Rock Corporation v. Merritt-Chapman & Scott Corporation, not officially reported, 1941 A. M. C. 801 22

Nicholson v. Erie R. Co., 255 Fed. 54, C. C. A. 2 19

O'Brien Bros. Inc. v. Davis, Director General, 300 Fed. 84, C. C. A. 2 ..... 4, 20

Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 660 9

Richmond & Danville Railroad Company v. Powers, 149 U. S. 43, 45 ..... 6, 9

Russell No. 5, The, 26 F. Supp. 575, 578, aff'd without opinion 104 F. (2d) 1018, C. C. A. 2 22

Stevens v. Edwards, 112 F. (2d) 534, C. C. A. 5 ..... 6, 10

Texas & Pacific Ry. Co. v. Harvey, 228 U. S. 319, 324 9

United States v. DeBack, 118 F. (2d) 208, C. C. A. 9 ..... 6, 10

United States v. Flannery, 268 U. S. 98 23

PAGE

United States v. Gamble-Skogmo Inc., 91 F. (2d) 372, 374, C. C. A. 8 ..... 6, 10

United States v. Title Ins. Co., 265 U. S. 472, 486 24

United States v. Washington Dehydrated Food Co., 89 F. (2d) 606, 609, C. C. A. 8 ..... 6, 10

Victoria, The, 95 Fed. 184, C. C. A. 2, cert. denied 175 U. S. 725 18

Westinghouse Co. v. Formica Co., 266 U. S. 342, 349 24

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,
against
SIDNEY BLUMENTHAL & COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Atlantic Coast Line Railroad Company, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit rendered November 16, 1943 reversing a judgment of the District Court for the Southern District of New York rendered July 28, 1942 (R. 218-19). That judgment dismissed respondent's complaint on the merits. The complaint (R. 2-3) alleges the destruction of plaintiff's merchandise in transit. The defense alleged in the answer (R. 4-5) and sustained by the District Court was "Act of God".

Jurisdiction

Jurisdiction is based on Section 240 (a) of the Judicial Code as amended; 28 U. S. Code, 347.

The mandate of the Circuit Court of Appeals was entered December 17, 1943 and a petition for a rehearing was denied the same day (R. 236-40).

Opinions Below

The District Court made findings of fact and conclusions of law (R. 215-17) but filed no opinion.

The opinion of the Circuit Court of Appeals is reported at 139 F. (2d) 288.

The petition for rehearing (R. 231-5) was denied without opinion (R. 236).

Summary Statement

The action arises out of damage sustained by respondent's shipment of cotton goods while en route between Rocky Mount, North Carolina and Shelton, Connecticut. The box car containing respondent's goods was thrown overboard from a carfloat while in transit between Greenville, New Jersey, and Bay Ridge, Brooklyn, New York Harbor, during the hurricane of September 21, 1938. The carfloat and the towing tug, Transfer No. 20, were owned and operated by petitioner's connecting carrier, The New York, New Haven & Hartford Railroad Company.

The bill of lading contained the "Act of God" exception (opposite R. 214).

The case was tried to the Court without a jury upon a stipulation of facts (R. 212-14) and the testimony of witnesses, including the meteorologist of the New York Weather Bureau.

The District Court found that Transfer No. 20 had been engaged since 7:00 a.m. in towing carfloats back and forth between Greenville and Bay Ridge, during which time the weather was rainy and squally with a strong wind varying between northeast and north; that at 2:15 p.m. tug Transfer No. 20 pulled the float containing respondent's merchandise from the float bridges at Greenville and at 2:20 p.m. had turned its tow around and proceeded toward Bay Ridge; that when Transfer No. 20 left Greenville the weather was substantially the same as it had been since 7:00 a.m.; that when Transfer No. 20 had reached a point close to its Bay Ridge destination the wind suddenly shifted to the northwest and blew with hurricane velocity which caused the float to pitch and toss and throw overboard the car containing respondent's merchandise (R. 215-16).

The District Court further found that hurricane warnings were flown from the New York Weather Bureau from noon to 2:15 p.m., at which time the hurricane warnings were hauled down and northwest storm signals [forecasting less severe weather] were hoisted pursuant to instructions from Washington which contained the forecast that the hurricane would likely pass over Long Island and Connecticut late in the afternoon or early in the evening; that the voyage of Transfer No. 20 was reasonably expected to require not more than sixty minutes; that "the hurricane was not anticipated by the local office of the United States Weather Bureau"; that the damage to respondent's merchandise was caused by an Act of God, the

hurricane, without negligence on the part of petitioner or its connecting carriers (R. 216-17).

The Circuit Court of Appeals held that the question concerning petitioner's alleged negligence was one of law not of fact, that rule 52 of the Federal Rules of Civil Procedure was not binding and that it was free to consider the case *de novo*.

In spite of the District Court's finding that "the hurricane was not anticipated by the local office of the United States Weather Bureau" and in spite of the fact that when Transfer No. 20 set out, the hurricane warning signals were hauled down and the latest forecast was that the hurricane would not strike even Long Island and Connecticut until late in the afternoon or early in the evening, the Circuit Court of Appeals held that Transfer No. 20 "had reason to anticipate what she in fact encountered [the hurricane]" and held petitioner liable because of the negligence of its connecting carrier in setting out at 2:15 p.m.

The Circuit Court of Appeals expressly overruled its own prior decision in *O'Brien Bros. Inc.* v. *Davis, Director General*, 300 Fed. 84, C. C. A. 2, and held the connecting carrier negligent for failing to inform the tug master of what its shore employees could have learned concerning the Weather Bureau's storm warnings—but not the warnings current at 2:15 p.m., rather the hurricane warning then obsolete. It further overruled its decision in *O'Brien Bros. Inc.* v. *Davis, Director General, supra*, and held petitioner's connecting carrier negligent for failing to maintain a barometer.

The judgment of the District Court was reversed and a new trial ordered.

Questions Presented

1. In a case tried to the District Court without a jury does rule 52 of the Federal Rules of Civil Procedure, providing that "findings of fact shall not be set aside unless clearly erroneous * * *", apply to the Court's finding as to the existence or non-existence of negligence?

2. Is a carrier liable for loss directly caused by a hurricane, Act of God, where, when its tug sets out, neither the current Weather Bureau forecast nor local conditions indicate any likelihood of the hurricane?

3. Is a tug, ignorant of but chargeable with knowledge of the Weather Bureau forecast, to be charged with an obsolete or the current forecast?

4. Is a tug operator, in respect of a short harbor movement, to be judged as to negligence by knowledge its shore personnel might have obtained had they made inquiry at the Weather Bureau, or by Weather Bureau forecasts available to the tug master?

5. Is a carrier, as to a short harbor movement, bound to maintain and consult a barometer?

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals as to its right to treat *de novo* the District Court's finding as to negligence is in conflict with the decisions of the Circuit Courts of Appeal for the Fifth, Eighth and Ninth Circuits

in the following cases: *Borserine* v. *Maryland Casualty Co.*, 112 F. (2d) 409, 416, C. C. A. 8; *United States* v. *DeBack*, 118 F. (2d) 208, C. C. A. 9; *City of San Diego* v. *Perry*, 124 F. (2d) 629, C. C. A. 9; *Fidelity & Deposit Co.* v. *Aberdeen Nat'l Bank & Trust Co.*, 124 F. (2d) 973, C. C. A. 8; *Stevens* v. *Edwards*, 112 F. (2d) 534, C. C. A. 5; *Andruss* v. *Nieto*, 112 F. (2d) 250, C. C. A. 9; *Helvering* v. *Johnson*, 104 F. (2d) 140 (C. C. A. 8; *United States* v. *Gamble-Skogmo Inc.*, 91 F. (2d) 372, 374, C. C. A. 8; *United States* v. *Washington Dehydrated Food Co.*, 89 F. (2d) 606, 609, C. C. A. 8.

In *Richmond & Danville Railroad Company* v. *Powers*, 149 U. S. 43, 45, this Court held that where there is uncertainty as to the existence of negligence the question is not one of law but of fact.

2. The decision of the Circuit Court of Appeals as to the effect of Weather Bureau storm warnings is in conflict with the decisions of the Circuit Courts of Appeal for the Third and Fourth Circuits and is so in conflict with various prior decisions in the Second Circuit as to leave the law wholly unsettled—see brief, *infra*, pages 11 to 20.

3. The decision of the Circuit Court of Appeals unsettling the law as to the operation of tugs as concerns the duty to observe or make inquiry concerning Weather Bureau forecasts, leaves the whole industry in doubt as to its rights and obligations.

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify and

to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its dockets "No. 66, October Term, 1943, Sidney Blumenthal & Company, Inc., Plaintiff-Appellant, against Atlantic Coast Line Railroad Company, Defendant-Appellee", and that the decision of the said Circuit Court of Appeals in said case be reversed and the judgment of the District Court therein be reinstated, and that your petitioner have such other and further relief as in the premises may be just.

ATLANTIC COAST LINE RAILROAD COMPANY
By CHAUNCEY I. CLARK
EUGENE UNDERWOOD
Counsel

Certificate

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel,
27 William Street,
New York 5, New York.

New York, N. Y.,
February 23, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner

against

SIDNEY BLUMENTHAL & COMPANY, INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION

FIRST POINT

The decision below that the District Court's finding of no negligence was a matter of law subject to review is in conflict with decisions of the Circuit Courts of Appeal for the Fifth, Eighth and Ninth Circuits.

In its opinion the Circuit Court of Appeals said:

> "Upon this appeal it [petitioner here] insists that there are no disputed questions of fact, and that, as the decision below was not 'clearly erroneous,' we have nothing to review. That depends upon whether we are to call the proper standard of care a question of fact. In cases tried to a jury it is indeed treated as such, although obviously it is not a question of fact, for it measures the duty and the liability which the law imposes; upon appeal in a cause tried to a judge, we think it should not be so regarded. As we view it, therefore, the cause comes before us as it did before the District Judge; like him, we have only to decide what measure of care the situation imposed" (R. 226).

This was plain error and contrary to considerable authority.

In *Richmond & Danville Railroad Company* v. *Powers*, 149 U. S. 43, this Court said:

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions from them" (p. 45).

To the same effect see *Texas & Pacific Ry. Co.* v. *Harvey*, 228 U. S. 319, 324; *McDermott* v. *Severe*, 202 U. S. 600, 604; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660; *Edwards* v. *Baltimore & O. R. Co.*, 131 F. (2d) 366, 368, C. C. A. 7.

In *Dooley* v. *Pease*, 180 U. S. 126, this Court said:

> "Where a case is tried by the Court, a jury having been waived, its findings upon questions of fact are conclusive in the Courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. Stanley v. Supervisors, 121 U. S. 547.
>
> Errors alleged in the findings of the Court are not subject to revision by the Circuit Court of Appeals, or by this Court, if there was any evidence upon which such findings could be made. Hathaway v. National Bank, 134 U. S. 498; St. Louis v. Retz, 138 U. S. 241; Runkle v. Burnham, 153 U. S. 225" (pp. 131-2).

Rule 52 of the Federal Rules of Civil Procedure explicitly admonishes the Courts that "findings of fact shall not be set aside unless clearly erroneous". This rule is as applicable to the finding of a Court, without a jury, that there was no negligence as it is to any other fact.

In *Borserine* v. *Maryland Casualty Co.*, 112 F. (2d) 409, C. C. A. 8, the Court said:

> "The trial court determined that Christopher & Company was not guilty of any negligence which would relieve the drawee banks of their liability. That finding, unless clearly erroneous, is binding on this Court. Rule 52(a) of the Rules of Civil Procedure, 28 U. S. C. A. following § 723c" (p. 416).

In *United States* v. *DeBack*, 118 F. (2d) 208, C. C. A. 9, the Court, upon appeal after trial without a jury, said:

> "Whether the motion of a train is of such nature as to constitute negligence is a question of fact" (p. 210).

In *Andruss* v. *Nieto*, 112 F. (2d) 250, C. C. A. 9, the Court, on an appeal after a trial without a jury, said:

> "* * * in any event, it was for the District Court to say, from all the evidence, whether defendant was guilty of negligence" (p. 252).

To the same effect see *City of San Diego* v. *Perry*, 124 F. (2d) 629, C. C. A. 9; *Fidelity & Deposit Co.* v. *Aberdeen National Bank & Trust Co.*, 124 F. (2d) 973, C. C. A. 8; *Helvering* v. *Johnson*, 104 F. (2d) 140, C. C. A. 8; *United States* v. *Gamble-Skogmo Inc.*, 91 F. (2d) 372, 374, C. C. A. 8; *United States* v. *Washington Dehydrated Food Co.*, 89 F. (2d) 606, 609, C. C. A. 8; *Stevens* v. *Edwards*, 112 F. (2d) 534, C. C. A. 5.

There is no support in the authorities and there is no support in reason for the decision below that the Circuit Court of Appeals was as free as the trial judge to decide *de novo* the question of negligence. The long established doctrine that the trier of the facts, whether jury or Court, determines as a matter of fact whether negligence exists, should not be upset without reason.

SECOND POINT

The decision below is in conflict with decisions of the Circuit Courts of Appeal for the Third and Fourth Circuits and is also in conflict with prior decisions in the Second Circuit.

The District Court found

> "7. The hurricane was not anticipated by the local office of the United States Weather Bureau. * * *" (R. 216).

This finding was supported by the uncontradicted testimony of the Weather Bureau meteorologist (R. 136-8).

Nevertheless, the Circuit Court of Appeals, entering the fact field *de novo,* found that the connecting carrier "had reason to anticipate what she in fact encountered [the hurricane]" (R. 229).

The basis of the finding of the Circuit Court of Appeals was the noon weather forecast in response to which the Weather Bureau hoisted hurricane flag signals. This forecast indicated that a tropical storm, central about one hundred miles east of the Virginia Capes, was moving rapidly northward attended by shifting gales. The forecast said nothing about the hurricane's striking New York. Indeed, the forecast confined its prophecy concerning winds of gale force to the coast of Maryland, South Delaware and New Jersey (see storm warning messages for September 21, 1938 opposite R. 214).

As the District Court found (Finding 7, R. 216) the hurricane flags were hauled down, and the noon forecast became obsolete at 2:15 p.m. when the local Weather Bureau

received new instructions from Washington. As of 2:15 p.m. the forecast was

> "Change to northwest storm warnings 2:00 p.m., Virginia Capes to Sandy Hook, New Jersey. Tropical storm central 12:00 noon about 75 miles east southeast of Atlantic City moving rapidly north northeastward with no material change in intensity since morning. Storm center will likely pass over Long Island and Connecticut late this afternoon or early tonight attended by shifting gales" (opposite R. 214).

Having held that

> " * * * the carrier is charged with notice of all information, available to those in its employ on shore * * * " (R. 226).

the Circuit Court of Appeals nevertheless charged petitioner's connecting carrier *not* with knowledge of the forecast current when the tug set out, but with an obsolete forecast cancelled as of 2:00 p.m. by the receipt at 2:15 p.m. of the forecast last quoted.

The Circuit Court of Appeals attempted on three grounds to escape the effect of the 2:15 p.m. forecast.

1. The Court found that the 2:15 p.m. message was received too late to stop the tug, reversing the Trial Court on a question of fact. The Trial Court found that at 2:15 p.m. the tug pulled the floats from the bridges but also found that it was not until 2:20 p.m. that the tug had turned the floats around and headed toward Bay Ridge (Finding 4, R. 215-16). The connecting carrier's dispatcher at Greenville testified without contradiction that the tug "backed out at 2:15 and left at 2:20" (R. 110). Since the tug did not depart until five minutes after the 2:15 p.m. forecast had been received, the Circuit Court of Appeals has charged

petitioner's connecting carrier with knowledge of an obsolete forecast, not current at the time of setting out.

2. The Court said of the 2:15 p.m. forecast: "like all such notices it was a forecast, and would tell nothing about the weather during the next thirty minutes, which was all that counted" (R. 229-30). Here again the Court reversed the District Court on a question of fact. The District Court found that the 2:15 p.m. forecast "contained the prophecy that the hurricane would likely pass over Long Island and Connecticut late in the afternoon or early in the evening" (Finding 7, R. 216-17). The forecast itself concludes with these words: "Storm center will likely pass over Long Island and Connecticut late this afternoon or early tonight attended by shifting gales" (opposite R. 214). Patently the forecast did exactly what the Circuit Court of Appeals said it did not do, viz., forecast the weather during the next thirty minutes. Indeed, it forecast that the hurricane would not strike even Long Island until "late" in the afternoon—long after Transfer No. 20 could reasonably be expected to have concluded its fifty to sixty minute run beginning at 2:15 p.m.

3. The Circuit Court of Appeals considered that the fact that the storm center would pass over Long Island was of small consequence because, as it said, as hurricanes come into high latitudes they extend their diameter although with decreasing velocity of wind (R. 230). Without benefit of evidence and in the face of contrary findings by the Trial Court the Circuit Court of Appeals purported to make a *nunc pro tunc* forecast casting aside the contemporary forecast of the United States Weather Bureau and held petitioner because its connecting carrier did not at the time make as successful a guess.

There was nothing in the local apparent conditions of weather to warn tug Transfer No. 20 of the imminence of the hurricane. The District Court found that the weather when the tug set out at 2:15 p.m. was substantially the same as it had been since 7:00 a.m. (Finding 5, R. 216). It is undisputed that Transfer No. 20 had been towing carfloats back and forth over the same route since 7:00 a.m. and had experienced no difficulty (R. 14-17; Finding 5, R. 216).

The Circuit Court of Appeals likewise stressed the falling barometer (R. 228). The connecting carrier had no barometer and did not know of its behavior. However, the Weather Bureau was amply equipped with barometers yet did not anticipate the hurricane in New York and did not expect it to strike Long Island until "late" in the afternoon or early in the evening. Nevertheless, the Circuit Court of Appeals held that it was negligence for the connecting carrier to fail to interpret its non-existent barometer more wisely than the United States Weather Bureau interpreted its many barometers and other instruments.

Conflicting Decisions

The decision of the Circuit Court of Appeals is in substantial conflict with the decisions of the Circuit Courts of Appeal for the Third and Fourth Circuits and it is in such conflict with its own prior decisions that the law in the Second Circuit is wholly unsettled.

In *The E. V. McCaulley*, 90 Fed. 510, C. C. A. 3, tugs set out with a seagoing tow in dubious weather conditions but no storm signals were flying. A storm arose and the tow was lost. The Court held the tugs not negligent, held that the tugs were entitled to rely upon the absence of

storm signals and "that those relying upon them should not be considered negligent or careless" (p. 511).

In *The Fred Smartley, Jr.*, 100 F. (2d) 971, C. C. A. 4, a tug set out with a tow from Baltimore under doubtful weather conditions but in the absence of storm signals at the Weather Bureau the tug was exonerated.

In *Bronx Barge Corporation* v. *Connelly Transp. Corporation*, 35 F. (2d) 294, C. C. A. 4, a tug set out with a tow from Norfolk. Arriving at Morehead City, N. C. storm warnings were up and the tug waited for four days and then proceeded. The following day the tug with her tow arrived at Cape Fear and in doubtful weather conditions proceeded to sea. No storm signals were flying, however, and although the tow was lost in a storm the tug was exonerated.

In *Morris & Cumings Dredging Co.* v. *Moran Towing & Transportation Co.*, 163 Fed. 610, aff'd 177 Fed. 1004, C. C. A. 2, no storm signals were flying when the tug passed Governors Island and although storm signals were hoisted soon thereafter the tug was exonerated.

In *The Argus*, 31 Fed. 481, D. C. Del., the tug passed out from Delaware Capes bound for Norfolk when no storm signals were flying, although the weather was doubtful. A storm arose, however, resulting in damage to the tow. The Court exonerated the tug expressing the sound rule succinctly: "He [tug master] used his best judgment in forecasting the weather, and cannot be held accountable for the want of infallibility" (p. 485).

Respondent may argue that although the hurricane signals were hauled down at 2:15 p.m. signals indicating a northwest storm immediately replaced them. However, storm signals, as distinguished from hurricane signals,

had been flying for many hours prior to the hoisting of the hurricane signals at noon, yet Transfer No. 20 had plied back and forth over the precise route since 7:00 a.m. with tows of exactly the same kind without experiencing any difficulty. It must be remembered, and was perhaps overlooked by the Circuit Court of Appeals, that it was not the northwest winds prophesied at 2:15 p.m. that caused the car containing respondent's merchandise to go overboard. Rather it was a hurricane which, although once predicted, was no longer predicted by the Weather Bureau when the tug set out.

The present and prior decisions of the Circuit Court of Appeals for the Second Circuit are so conflicting that the law on the point is completely unsettled. In the instant case, the Court has held that a tug is negligent for failing to anticipate the arrival of a hurricane, although when it set out, hurricane signals were not flying and the Weather Bureau did not anticipate the hurricane in New York Harbor. In other cases it has exonerated tugs although they set out in the face of Weather Bureau warnings forecasting the arrival of the very storm causing the damage.

In *Bouchard Transp. Co.* v. *Pennsylvania R. Co.*, 6 F. (2d) 362, C. C. A. 2, storm signals were flying but the tug was exonerated. The Court said:

> "The case obviously turns primarily upon the condition of the weather. * * * Before the Mercer left the scow, warnings of a southeasterly storm had been raised upon the [Weather Bureau] building. Nevertheless we agree with the learned District Judge in his conclusion that it was not imprudent to leave the barge in the flotilla at half past 10 on that night. On more than 50 days of the year storm signals are raised in the harbor of New York. It is true that masters are chargeable with notice of such warnings (Nicholson

v. Erie R. Co., 255 F. 54, C. C. A. 2), and are prima facie negligent if they do not see them.

But the fact of a warning is not enough, without more, to constitute negligence. The Golden Rule, 278 Fed. 1021, C. C. A. 2. See the unreported opinion below of Hough, J. We cannot agree that all work in the harbor must be suspended, for a day out of each week because the winds will blow" (pp. 362-3).

In *The Mack*, 43 F. Supp. 270, aff'd 130 F. (2d) 201, C. C. A. 2, the tug set out with her tow in disregard of storm warnings then flying at the Weather Bureau and of a low and falling barometer. The District Court exonerated the tug and the Circuit Court of Appeals affirmed, expressing surprise in a *per curiam* opinion that so many fruitless appeals are taken.

See also *Hartford & New York Transp. Co.* v. *Rogers & Hubbard Co.*, 47 F. (2d) 189, C. C. A. 2, certiorari denied, 283 U. S. 835.

In *The Katie E.*, 46 F. (2d) 534, E. D. N. Y., the tug set out in the face of storm warnings and was exonerated. The Court said:

"In the first place, the neglect of the storm warning is frankly conceded, but is not of itself sufficient to constitute negligence. Bouchard Transp. Co. v. Pennsylvania R. Co. (C. C. A. 2) 6 F. (2d) 362. Moreover, the safe accomplishment of the taking of the light tow in the morning of the same day from New York to Port Reading apprised the captain of the actual then prevailing conditions, and formed some basis for his judgment concerning the return trip" (p. 536).

In *The Imoan*, 67 F. (2d) 603, C. C. A. 2, the tug proceeded from Port Jefferson, Long Island Sound for New York. The weather was not obviously dangerous and the tug master did not telephone the Weather Bureau. The

Court found that had he telephoned he would have got advices which should have kept a careful navigator in port. The Court refused to hold that the master was negligent in failing to obtain the Weather Bureau forecast.

In *The Herkimer,* 52 F. (2d) 41, C. C. A. 2, certiorari denied 284 U. S. 665, the tug left Brewerton on Lake Oneida with a tow but before it reached Sylvan Beach, twenty-one miles away, a storm arose causing the damage sued for. The District Court held the tug at fault for leaving Brewerton without making some effort to ascertain what the weather conditions were on the lake. The Circuit Court of Appeals reversed, saying:

> "But we know of no obligation on a master to tie up for three hours to await a weather report, or indeed to make any inquiries, before embarking upon a voyage of only a few hours' duration, when all observable conditions are favorable at the time of departure" (p. 43).

In *The Victoria,* 95 Fed. 184, C. C. A. 2, certiorari denied 175 U. S. 725, the Court said:

> "The navigators of the tugs did not notice the cautionary signals displayed, nor did they advise themselves of the dispatches received at the New York weather bureau station before their departure to get their tow. The district judge holds them in fault for not 'regarding the previous public notice of a coming violent S.E. storm, with which they must stand chargeable.' We are unable to assent to this proposition. We do not find in the record any evidence that the movement of a tropical storm up the Atlantic coast will produce such a condition of affairs on the Hudson river, 40 miles from its mouth, as to make it unsafe for navigation by tugs and tows; and, in the absence of such evidence, are not inclined to hold navigators responsible for failure to keep in touch with the weather bureau reports, as they do on the seacoast, or in Long

> Island Sound. So far as appears, navigators upon the Hudson river have never regulated their movements by the reports as to gales or hurricanes upon the Atlantic coast, nor tied up their tows awaiting the fulfillment of weather bureau prophecies" (p. 186).

The effect of the instant decision is substantially to make the tug an insurer of the accuracy of its own weather forecasts. This was not formerly the law in the Second Circuit. In *The Headlight*,* 300 Fed. 84, C. C. A. 2, the Court expressly refused to go further than say that the failure of tug masters to heed weather bureau warnings is some evidence of negligence. The Court said:

> "We have held in Nicholson v. Erie Co., 255 Fed. 54, and repeated the statement in McWilliams v. Davis, 285 Fed. 312, that it is the duty of tug masters in the harbor of New York to note and give weight to the warnings of the Weather Bureau, and failure so to do is some evidence of negligence. Beyond this declaration we are not inclined to go. In this instance the only warning was against a northeast storm, and no study of that signal would have told anyone that shifting boats under the lee of the Brooklyn shore was dangerous" (p. 86).

So here, the hauling down of the hurricane signals and the substitution of northwest storm signals at 2:15 p.m. warned no one of the possibility of the arrival of the hurricane which caused respondent's loss.

In reaching the conclusion stated in *The Headlight*, supra, just quoted, the Court was not promulgating new doctrine but merely reiterated what had long been the law in the Second Circuit. See *Nicholson* v. *Erie R. Co.*, 255 Fed. 54, C. C. A. 2, and *McWilliams Bros. Inc.* v. *Davis*, 285 Fed. 312 (C. C. A. 2).

For a recent case analogous to the instant case in that

---

* Referred to elsewhere as *O'Brien Bros. Inc.* v. *Davis, Director General.*

the tug set out after the storm warning had been withdrawn, see *The Bump*, 56 F. (2d) 203, E. D. N. Y., where the Court said:

> "The fact that the storm warning had been taken down at noontime has a significance that cannot be overlooked in forming an estimate of the foresight reasonably to be required on the part of the tug's captain" (p. 205).

THIRD POINT

The decision below leaves the whole industry in doubt as to its rights and obligations.

On two different points the Circuit Court of Appeals departed from the settled law as expressed in its prior decision in *O'Brien Bros. Inc.* v. *Davis, Director General*, 300 Fed. 84.

In the *O'Brien Bros.* case the District Court, 287 Fed. 543, held that the Director General of Railroads, operating the New York Central Railroad Company fleet of tugs in New York Harbor, was negligent in failing to apply to the Weather Bureau for a forecast of the weather and supplying the tug masters with the forecast so obtained. The Circuit Court of Appeals reversed, holding that there was no duty on the part of the owner and operator of tugs to apply for special forecasts and that the only duty was that on the part of the tug master to keep himself acquainted with weather warnings publicly displayed. The Circuit Court of Appeals there said:

> "We have held in Nicholson v. Erie Co., 255 Fed. 54, 166 C. C. A. 382, and repeated the statement in McWilliams v. Davis, C. C. A., 285 Fed. 312, that it is the duty of tug masters in the harbor of New York to note and give weight to the warnings of the Weather

Bureau, and failure so to do is some evidence of negligence. *Beyond this declaration we are not inclined to go.* In this instance the only warning was against a northeast storm, and no study of that signal would have told any one that shifting boats under the lee of the Brooklyn shore was dangerous.

There can be no reason for imposing one rule upon the navigator and owner of one tug, who when out in the harbor can see only the warning, and another upon the operator of numerous tugs. *The ultimate test of liability in a case between tug and tow is practically always the management of the directing tug as a towing entity,* and the only just rule is to treat all tugs alike so far as general regulations are concerned. There is no evidence for taking this case out of the general regulation we have already quoted (italics ours).

The master of any vessel is bound to ordinary care and the skill of his calling, and no more. The length and breadth of that measure is to some extent a matter of definition by courts. By the decisions above cited it is held to be a part of such care or skill to observe Weather Bureau *warnings* as publicly displayed. We do not deem it part of the duty of such navigator to ascertain whether the local Weather Bureau has any private information or unpublished opinions about weather to come" (p. 86).

This declaration has been regarded as the law, at least in this Circuit, since 1924 when the opinion was handed down. There is no evidence in the instant case of any change in conditions or of any practice or custom to justify a change in the rule. Nevertheless the Circuit Court of Appeals below expressly overruled its earlier decision in the *O'Brien Bros.* case saying:

"In determining that we hold that the carrier is charged with notice of all information, available to those in its employ on shore, and that its liability is not limited by what the tug's master knew. That, it is true, is contrary to O'Brien Bros. Inc. v. Davis, Director General, 300 Fed. Rep. 84, 86, where we held that

> the 'ultimate test of liability in a case between tug and tow is practically always the management of the directing tug as a towing entity.' * * * The fiction that in such a situation the liabilities are to be judged by treating the tug as a jural person, has neither reason nor authority to commend it. Pro tanto, we therefore overrule O'Brien Bros. v. Davis, Director General, supra (300 Fed. Rep. 84)" (R. 226-7).

In the *O'Brien Bros.* case the Circuit Court of Appeals expressly held that a New York Harbor tug is not obliged to carry or consult a barometer. Indeed, the Court went further and took the position that in the absence of some showing of usage or custom it was not within the province of the Court to lay down a rule that a harbor tug must carry a barometer. The Court said:

> "We cannot agree that the evidence in this case presented any question as to the duty of the individual tugboat master to carry a barometer. The equipment of vessels, whether used in harbors or on the high seas, is regulated either by tradition or statute. No statute requires a harbor tug to carry a barometer, and there is no evidence showing usage, custom, or tradition in support of the practice suggested. We do not think it lies within the province of a Court to lay down such a rule as the one suggested, in the absence of evidence on the subject" (pp. 85-6).

In the instant case there is no evidence showing any usage, custom or tradition as to the carrying of barometers by harbor tugs.

Subsequent to the *O'Brien Bros.* decision the rule that harbor tugs are not required to carry barometers was twice reiterated. *The Russell No. 5*, 26 F. Supp. 575, 578, aff'd without opinion, 104 F. (2d) 1018, C. C. A. 2; *New York Trap Rock Corporation* v. *Merritt-Chapman & Scott Corporation*, not officially reported, 1941 A. M. C. 801.

Although in 1924 the Circuit Court of Appeals thought it outside its province to lay down as a rule that harbor tugs must carry barometers, in the instant case the Court had no such reluctance. The Court said:

> "The carrier had no barometer at the Greenville Station, or, so far as appears, anywhere else; a fault on the part of one engaged in such extensive maritime operations" (R. 228).*

In the *O'Brien Bros.* case the Court said:

> "There can be no reason for imposing one rule upon the navigator and owner of one tug, who when out in the harbor can see only the warning, and another upon the operator of numerous tugs" (p. 86).

With the authoritative language of the *O'Brien Bros.* decision before them, operators of tugs in New York Harbor were entitled to regard it as settled law that they were neither obliged to maintain barometers nor to obtain from the Weather Bureau and pass on to tug masters forecasts of the weather. It is not unfair to say that operations generally in New York Harbor were conducted on that basis. However, in the midst of litigation, after the event, the Court below has changed the rule in two respects without evidence establishing any change of conditions to justify a new rule.

In *United States* v. *Flannery*, 268 U. S. 98, this Court said that

> "Decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons" (p. 105).

---

* It is noteworthy that the extent of the operations of petitioner's connecting carrier was not established. Whether it operated two or twenty tugs does not appear.

To the same effect see *Westinghouse Co.* v. *Formica Co.*, 266 U. S. 342, 349; *United States* v. *Title Ins. Co.*, 265 U. S. 472, 486; *National Bank* v. *Whitney*, 103 U. S. 99, 102.

Indeed, in *The Fulton*, 54 F. (2d) 467, C. C. A. 2, the Court, although disagreeing with its earlier decisions, considered itself bound thereby saying:

> "However, unless the Supreme Court chooses finally to settle the whole matter otherwise, in crossing situations *we have no option* and shall continue to disregard the rule, whatever our personal judgment" (p. 468; italics ours).

In *The Eastern Glade*, 101 F. (2d) 4, C. C. A. 2, the Court, reluctant to follow its previous decisions, nevertheless considered itself bound thereby.

LAST POINT

It is respectfully submitted that the writ of certiorari prayed for should be granted, that the decision of the Circuit Court of Appeals be reversed, and that the judgment of the District Court be reinstated, with costs.

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

New York, N. Y.
February 23, 1944.

(P-368)

(7)

Supreme Court of the United States

OCTOBER TERM, 1943

No. 737

ATLANTIC COASTLINE RAILROAD COMPANY,

Petitioner,

against

SIDNEY BLUMENTHAL & COMPANY, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BAILEY & MULLER,
Attorneys for Respondent.

THEODORE L. BAILEY,
Counsel.

JULIUS F. STEINBRENNER,
of Counsel.

CORPORATE PRESS, INC., NEW YORK CITY

INDEX

PAGE

STATEMENT 1

COMMENTS ON PETITIONER'S SUMMARY STATEMENT 2

FINDINGS AS TO STORM WARNINGS 2

POINT I—The conclusions of law of the District Court as to negligence and liability were reviewable on appeal 2

Findings of fact were not disturbed by Circuit Court of Appeals 3

District Court overlooked some of the Weather Bureau reports 3

The Circuit Court of Appeals reversed on a question of law as to the liability of railroads 3

The Circuit Court of Appeals properly reviewed the decision and findings of the Trial Judge under Rule 52 of the Rules of Civil Procedure ..... 4 and 5

POINT II— A railroad is in duty bound to keep itself advised from the Weather Bureau of unusual threatening storm hazards, and inform its employees having the custody and care of goods in transit 5

The effects of the hurricane were anticipated at New York Harbor, though the "center" was expected to pass over Long Island ..... 5 and 6

The District Court found that the tug started its trip at 2:15 P. M. 6

Origin and function of Weather Bureau 7

These railroads operate a fleet of tugs 7

PAGE

A common carrier is charged with the liability of an insurer for the purpose of raising a stringent motive for the exercise of carefulness 8

To avail itself of "Act of God" the carrier must show that it acted seasonably and did everything which an experienced carrier could do to avoid it ..... 8 and 9

Owners of tugs should supply the tugmaster with Weather Bureau warnings of the approach of unusual hazards 10

Weather Bureau will be encouraged to progressive usefulness by the rule requiring railroads to apply to it for information 11

The safety of life as well as property is involved 11

This same storm and storm warnings were involved in the McAllister, Johnson, and New York Trap Rock cases, all within the 2nd Circuit ..... 11, 12 and 13

Duty to observe warnings ..... 13, 14, 15 and 21

Duty to observe barometer ..... 13, 14 and 19

The Fourth Circuit is in accord 14

These railroads had no system of weather observation nor of transmitting reports of the Weather Bureau, to their employees 17

New York Harbor was predicted to be in path of hurricane 17

Unusual drop of barometer at New York and steadily increasing wind velocity, also indicated approach of storm 18

The "current" warnings at New York 18

At New York, storm signals flew continuously from 7 A. M. to 6:30 P. M. 18

PAGE

The signal, warning of approach of a "hurricane," raised at 12 noon was not changed to a storm signal until after 2:15 P. M. when the tug departed 18

POINT III—The railroad industry cannot now be in doubt as to its duty to avail itself of the free Weather Bureau service in order to be informed of forecast of hazards to goods in transit from unusual storms or hurricanes 19

The "Headlight" decision in the 2nd Circuit is not overruled except as to "jural personality" of tug 19

The tug is not a "jural person" 20

Consumers Import Co. v. Kabushiki Zosinjo decided by Supreme Court November 8, 1943 .. 20

Opinion of Circuit Court of Appeals 21

Writ should not issue 21

Conclusion 22

AUTHORITIES CITED

PAGE

Aetna Life Insurance Company v. Kepler, 116 Fed. (2) 1, 4 (Circuit Court of Appeals, 8th Circuit 1941) 4
Argus, The, 31 Fed. 481, D. C. Del. 9

Bouchard Transp. v. Pennsylvania RR. Co., 6 Fed. (2) 362, C. C. A. 2 10
Bronx Barge Corp. v. Connelly, 35 Fed. (2) 294, C. C. A. 4 9
Bump, The, 56 Fed. (2) 203, E. D. N. Y. 18

Chehaw, 54 Fed. (2) 645, 1931 (S. D. N. Y.) 16
Chesapeake & Ohio Railroad v. Wix & Sons, 87 Fed. (2) 257 (C. C. A. 4th 1937) 9
Chicago & E. Company v. Collins Produce Company, 249 U. S. 186 8
City of Norwich, The, 118 U. S. 468, 502 20
Commercial Molasses Corp. v. N. Y. Tank Barge, 314 U. S. 104 8
Consumers Import Co. v. Kabushiki (Advance Opinions, Vol. 88, pp. 9, 11 [Nov. 8, 1943]) 11, 20

Doherty v. Pa. R. R., 269 Fed. 959, 963 (1920) 14

E. V. McCaulley, 90 Fed. 510 C. C. A. 3 9

Fred Smartley, Jr., 100 Fed. (2) 971, C. C. A. 4 9

Headlight, The, 300 Fed. (2) 84 ..... 11, 19, 20
Hughes Federal Practice (1940) Vol. 18, pp. 34, 37, 38 5
Hughes Federal Practice, Supplement of 1943, p. 100 5

Johnson, The, 1939 American Maritime Cases 526 (E. D. N. Y.) 12
Johnson v. Kosmos Portland Cement Co., 64 Fed. (2) 193 (6th Circuit 1933) p. 194 (certiorari denied 290 U. S. 641) 3

Maryland Transportation Co. v. Dempsey, 279 Fed. 94, 97 14
McAllister Bros., Inc. v. The Pennsylvania Railroad, 1941 American Maritime Cases 492 11

PAGE

McWilliams v. Davis, 285 Fed. 312 (1922) (cert. denied 260 U. S. 747) 15
Morris & Cummings Dredging Co. v. Moran, 163 Fed. 610, affirmed 177 Fed. 1,004, C. C. A. 2 9

New York Central No. 16, 50 Fed. (2) 393 15
New York Trap Rock v. Merritt Chapman, 1941 American Maritime Cases, 801 (E. D. N. Y.) 13
Nicholson v. Erie R. R., 255 Fed. 54 (1918) 14, 15

O'Brien Bros. Inc. v. Director General of Railroad, 287 Fed. 543 10

Railroad Co. v. Lockwood, 84 U. S. 357 (17 Wall. 357) 7, 20
Rule 52 of the Rules of Civil Procedure 3, 4, 5

Salutation, The, 239 Fed. 421 (S. D. N. Y.) (1916) ... 13
Section 313 of Title 15 United States Code Annotated 7

Texas & Gulf Steamship Co. v. Parker, 263 Fed. 864 (certiorari denied 253 U. S. 488) 8
T. J. Hooper, 53 Fed. (2) 107 (S. D. N. Y.) (aff. 60 Fed. [2] 737 cert. denied 287 U. S. 662) 14

Union Steamship Co. v. Virginia Steamship Co., 65 U. S. 307, 313 8

Victoria, 79 Fed. 122 (S. D. N. Y.) (1897) 14

United States Circuit Court of Appeals

OCTOBER TERM, 1943

ATLANTIC COASTLINE RAILROAD COMPANY, *Petitioner,* against SIDNEY BLUMENTHAL & COMPANY, INC., *Respondent.*	No. 737

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement.

The decision of the United States Circuit Court of Appeals, 2nd Circuit, not only reversed the District Court but also remanded the cause for a new trial (R. 235).

This action arose out of damage sustained by respondent's goods in the stipulated amount of $17,157.55 while in transit under a through railroad bill of lading issued in Interstate Commerce (R. 214). This shipment was routed by the respondent from Rocky Mount, North Carolina, to Shelton, Connecticut, all rail (not part rail and part water). Therefore, the cheaper, part rail and part water, freight rate was not paid, nor were the extra hazards of transport by water assumed by shipper.

The petitioner sued respondent as "Initial Carrier" under the Carmack Amendment to the Interstate Commerce Act.

The railroads were acting as common carriers (insurers) and not as towers or bailees, who are involved in most of the cases cited by petitioner.

Comments on Petition's Summary Statement.

The petition states (p. 3) "The District Court further found that hurricane warnings were flown from the New York Weather Bureau from noon to 2:15 P. M., at which time the hurricane warnings were hauled down."

The District Court's finding (R. 216) was that "whole gale warnings were flown to about 2:15." There is no finding as to when the whole gale warnings were hauled down—merely a finding that at 2:15, the New York office "received from the main office in Washington, instructions to 'haul down the whole gale signals and substitute northwest storm signals.'"

The petition (p. 3) refers to the Northwest Storm Signals as "forecasting less severe weather." The District Court did not so find and this 2:15 warning itself read (R. 214) "No material change in intensity since morning."

In any event, petitioner did nothing to ascertain from the Weather Bureau, what the forecasts and warnings were, nor the action of the barometer, nor did it advise its dispatchers or tug captain of such facts.

POINT I.

The conclusions of law of the District Court as to negligence and liability were reviewable on appeal.

The First Point assigned by petitioner for granting a writ is that the decision of the Circuit Court of Appeals as to its right to treat "de novo" the District Court's findings as to negligence is in conflict with the decisions of the Circuit Court of Appeals for the Fifth, Eighth and Ninth Circuits, in cases cited.

In its Opinion, the Circuit Court of Appeals has not disturbed any of the Findings of Fact of the Trial Judge, nor did it use the expression "*de novo.*"

After the close of the trial, the Trial Judge stated (R. 206):

> "No matter what the witnesses say, they cannot contradict the records. I think in all these cases the records are of much greater probative force than anything a witness may say as to how strong the winds were or how high the waves were."

The Weather Bureau Records were in evidence (R. 214), but the Trial Judge evidently overlooked them and declined to receive briefs (R. 205, 206 and 207) which could have pointed out the pertinent portions of these records.

The Circuit Court of Appeals however, without altering the Findings of Fact, sets forth in its Opinion, many of the Weather Bureau Records, and fits them in together with the Findings of Fact without conflict.

It is only as to the Conclusions of Law respecting negligence and the liability of the railroad common carriers, that the Circuit Court of Appeals disagreed with the District Court.

Where the law applied to the facts reposes unuttered in the mind of the District Court, no presumption of correctness obtains and the Circuit Court of Appeals may review the ultimate finding of negligence.

> *Johnson* v. *Kosmos Portland Cement Co.*, 64 Fed. (2) 193 (6th Circuit 1933) p. 194 (certiorari denied 290 U. S. 641).

Indeed the District Court recognized that the finding of negligence was an ultimate conclusion of law for it treated it as such (R. 215-7).

Furthermore the petitioner apparently overlooks the effect of the adoption of Rule 52 of the Rules of Civil Procedure in 1938.

The effect of the adoption in 1938 of the Rules of Civil Procedure, and Rule 52 (a) is summarized in the case of *Aetna Life Insurance Company* v. *Kepler*, 116 Fed. (2) 1, 4 (Circuit Court of Appeals, 8th Circuit 1941) in which the Court discussed this change as follows:

> "(3) Prior to the effective date (September 16, 1938) of the Rules of Civil Procedure, the findings of fact of a trial court, in an action at law tried without a jury, were as conclusive, upon review, as a verdict of a jury, and could not be set aside by the reviewing court if there was any substantial evidence to support them. A different rule prevailed in equity cases. The findings of fact of the trial court in such cases were presumptively correct, and, unless clearly against the weight of the evidence or induced by an erroneous view of the law, would not be disturbed by a reviewing court.
>
> Rule 52 (a) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, provides '* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *.'
>
> The effect of Rule 52 (a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity.
>
> This Court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all non-jury cases in accordance with the practice which formerly prevailed in equity appeals.
>
> (4) The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this Court."

See also *Hughes Federal Practice* (1940) Vol. 18, pp. 34, 37, 38. Also *Hughes Federal Practice, Supplement of 1943,* p. 100.

There is no conflict between the Circuit Courts of Appeal with respect to the power of the Circuit Court of Appeal to review the ultimate question of negligence since the adoption of Rule 52, with respect to jury-waived trials. The cases cited by the petitioner which deny this power, antedate the adoption of Rule 52.

In the cases cited by petitioner which have arisen since the adoption of the Rules of Civil Procedure, the Circuit Courts of Appeal showed no hesitation in reviewing the principles of law and the standard of care applied by the District Court to the factual situation and after approving the standard applied by the Trial Court also reviewed the facts and found no error.

At all events, the District Court in the instant case made no reference to "negligence" in its Findings of Fact; only in its Conclusions of Law (R. 215-7).

POINT II.

A railroad is in duty bound to keep itself advised from the Weather Bureau of unusual threatening storm hazards, and inform its employees having the custody and care of goods in transit.

The Second Point of petitioner (pp. 6 and 11) is that the decision of the Circuit Court of Appeals as to the effect of Weather Bureau storm warnings is in conflict with the decisions of the 3rd and 4th Circuit and is in conflict with various prior decisions in the 2nd Circuit.

The Petition states (p. 11) that the District Court found that the hurricane was not anticipated by the local office of the United States Weather Bureau and that the finding was supported by the testimony of the Weather

Bureau meteorologist. The meteorologist so testified, but qualified by adding "*as of 2:15 P. M.*" (R. 138) that is, at the moment when he received from Washington the warning stating that the "storm *center* will likely pass over Long Island." The Finding does not state the time as of which the New York Office did not anticipate the hurricane.

The meteorologist testified with respect to the warning received at 2:15 P. M. (R. 137):

> "We anticipated that the hurricane would pass close to Long Island—pass across Long Island, when we issued the warning" (R. 138).

and that the warning was not issued until *after* 2:15 P. M. (R. 138).

Naturally, as the storm center moved northerly and approached closer to Long Island, the wind velocity in New York harbor would and did steadily increase. Between 2 and 3 P. M. the average was 60 and maximum 69 and between 3 and 4 the average was 62 and maximum 70 (R. 214). The accident happened at 2:45 P. M. (R. 38).

The Petition (p. 12) states, "The Court (C. C. A.) found that the 2:15 P. M. message was received too late to stop the tug, reversing the Trial Court on a question of fact."

The District Court found:

(a) That at 2:15 P. M. the tug pulled the floats and started to tow them to Bay Ridge (R. 215).

(b) That the tug left Greenville bound for Bay Ridge at 2:15 P. M. (R. 216, P. 5).

(c) That the voyage of the tug started at 2:15 P. M. (R. 217).

It is not reasonable to charge the tug departing at 2:15 P. M. with a warning received by the Weather Bureau at 2:15 and not published until *after* 2:15 (R. 138).

The decision of the Circuit Court of Appeals 2nd Circuit, in the instant case, is in agreement with the other Circuits as well as with this Court.

The Weather Bureau was established by Congress prior to 1900 and its purpose is stated in Section 313 of Title 15 United States Code Annotated, as follows:

> "The Chief of the Weather Bureau shall have charge of the forecasting of weather, the issuance of storm warnings and display of weather signals and flood signals for the benefit of agriculture, commerce and navigation."

The damage to plaintiff's merchandise occurred while in rail transit across the New York harbor on a carfloat operated by a connecting rail carrier. The shipment was a shipment in Interstate Commerce. The lighterage service at New York harbor was adopted by the Railroad Companies many years ago and has been recognized as an integral part of the rail transit by the Statutes and the Regulations of the Interstate Commerce Commission for many years. Both the Pennsylvania Railroad and the New York, New Haven & Hartford Railroad operate a veritable fleet of tugs, carfloats and barges as an integral facility of their rail transportation. (See Official Publication of the United States Department of Commerce "Merchant Vessels of the United States 1937," pp. 732, 741.)

In *Railroad Co.* v. *Lockwood,* 84 U. S. 357 (17 Wall. 357), Mr. Justice BRADLEY said at page 377:

> "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent

motive for the exercise of carefulness and fidelity in his trust."

To the same effect, *Chicago & E. Company* v. *Collins Produce Company,* 249 U. S. 186.

In *Union Steamship Co.* v. *Virginia Steamship Co.,* 65 U. S. 307, 313, this Court said:

> "It is not inevitable accident, as was well remarked by the learned judge in the case of Juliet Erskine, 6 Notes of Cases 634, where a master proceeds carelessly on his voyage, and afterwards circumstances arise, when it is too late for him to do what is fit and proper to be done." He must show that he acted seasonably, and that he "did everything which an experienced mariner could do, adopting ordinary caution. * * *"

In the case at bar the Trial Judge declined to go along as far as this (R. 211).

This Court in *Commercial Molasses Corp.* v. *N. Y. Tank Barge,* 314 U. S. 104 (citing cases) said at page 109:

> "One who has assumed the obligations of a common carrier can relieve himself of liability for failing to carry safely only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexes to his undertaking, or for which it permits him to stipulate. The burden rests upon him to show that the loss was due to an excepted cause and that he exercised due care to avoid it, not in consequence of his being an ordinary 'bailee' but because he is a special type of bailee who has assumed the obligation of an insurer."

In *Texas & Gulf Steamship Co.* v. *Parker,* 263 Fed. 864 (certiorari denied 253 U. S. 488) the vessel had put out in the face of storm warning signal. The Circuit Court of Appeals (5th) said at page 868:

> "The exceptions in the bill of lading are not available where the 'Act of God' from a peril of the sea causing the loss could have been avoided by the exercise of due care and diligence. In that event, the negligence and not the peril of the sea is deemed the proximate cause of the loss."

The case of *Chesapeake & Ohio Railroad* v. *Wix & Sons,* 87 Fed. (2nd) 257 (C. C. A. 4th 1937) involved damage to tobacco in cars during the famous Norfolk hurricane of 1933. The Court said at page 259:

> "A well considered case substantiating the position taken by the trial judge is that of Ferguson v. So. Railway, 91 S. C. 61; there the Court said: 'It requires no citation of authority to sustain the proposition that, after the carrier has discovered, or by the exercise of reasonable prudence and diligence should have discovered, that goods in his possession are subject to the perils of an unprecedented flood, or other vis major, it is his duty to exercise reasonable care and diligence to save them from damage or loss.'"

and also at page 259:

> "This court would be inclined to go further and say that the defendant was negligent as a matter of law in its failure to maintain a more adequate system of weather observation in order to safeguard the property of others which had been entrusted to its custody for transporting and transferring to Steamship Lines."

At page 14 the petition cites in support of its Point II the *E. V. McCaulley,* 90 Fed. 510 C. C. A. 3 and at page 15, the *Fred Smartley Jr.,* 100 Fed. 2nd 971, C. C. A. 4; *Bronx Barge Corp.* v. *Connelly,* 35 Fed. 2nd 294, C. C. A. 4; *Morris & Cummings Dredging Co.* v. *Moran,* 163 Fed. 610, affirmed 177 Fed. 1,004, C. C. A. 2, and *The Argus,* 31 Fed.

481, D. C. Del., in all of which cases the tugs put out when *no* storm signals were flying. In the instant case storm warning signals were flying from 7 A. M. until 6:30 P. M., nor was the Common Carrier's liability and duty involved in the above cases.

There Is No Conflict With Prior Decisions in the 2nd Circuit Except as to Jural Personality.

The petition then cites cases in the C. C. A. 2nd Circuit, as in conflict with the instant case. However, an analysis of prior decisions of the 2nd Circuit will show no disagreement with the instant decision except as to Jural Personality of the Tug.

In *Bouchard Transp.* v. *Pennsylvania RR. Co.*, 6 Fed. 2nd 362, C. C. A. 2, storm signals were flying. It was said:

> "It is true that masters are chargeable with notice of such warnings (*Nicholson* v. *Erie RR. Co.*, 255 Fed. 54, C. C. A. 2) and are *prima facie* negligent if they do not see them."

In *O'Brien Bros. Inc.* v. *Director General of Railroad*, 287 Fed. 543, Judge WARD (1922), said at page 544:

> "(1) If the liability in this case depended solely on the conduct of the master of 'No. 10,' I should have some hesitation in holding the Director General liable. But I think that, in case of persons who are largely interested in handling boats without motive power of their own in this harbor, the court should go back of the tug captains in the inquiry whether due care and skill and diligence have been exercised in the premises. The evidence is that the local Weather Bureau at New York knew, not only from the dispatch from Washington at 8 P. M. of the 13th, but from the steady backing of the wind from east to northeast and from the rapid and uniform falling of the barometer, that a violent storm from the northwest was to be expected. The office is open day and night, and inquiries are constantly made

of it by persons interested in harbor shipping. The captains of these harbor tugs are not left to act on their own responsibility, as the masters of ships at sea must be left. Their movements are regulated direct from the office of their employers.

(2) When the government supplies to the public such a reliable source of information, I think persons who have the care of large numbers of helpless boats should apply to it for information and advice. There is no evidence whatever that the Director General did so. No such rule, as far as I am aware, has been laid down by judicial authority; but it seems to me that such a requirement will not only increase safety of life and property in the harbor, but will encourage the National Weather Bureau to progressive improvement and usefulness. Therefore I hold that the Director General was wanting in due care and diligence in not applying to the local bureau, under the circumstances in this case, for a forecast of the weather. If he had done so seasonably, I am sure he would have been advised of the danger to the boats at Bush's Piers, and would have had plenty of time to remove them to a safe berth. See Nicholson v. Erie R. Co., 255 Fed. 54."

The above case was reversed by the C. C. A. (2nd) under the caption of "The Headlight," 300 Fed. (2) 84, upon the theory of "jural personality" of the Tug. However this fiction with relation to railroads operating tugs in interstate commerce was discredited in the instant case. This is in accord with the views of this Court, in

Consumers Import Co. v. *Kabushiki* (Advance Opinions, Vol. 88, pp. 9, 11 [Nov. 8, 1943]).

This very storm was involved in the case of *McAllister Bros. Inc.* v. *The Pennsylvania Railroad,* 1941 American Maritime Case 492, and Judge CAMPBELL (E. D. N. Y.) said at page 498:

"Sufficient has been said in the statement of facts in this opinion, as to the warnings of a hurricane and its progress along the Atlantic Seaboard for at least three days before the storm broke at New York on September 21st, and the specific warning of its approach to the New York area given on the morning of September 21st, should have apprised the respondent of the danger of a severe storm breaking at New York. *Philip Rice* v. *City of New York, et al.*, 1939 A. M. C. 526.

"It was the duty of the respondent, where there was a warning of a wind from the northeast, accompanied by a rapidly falling barometer, which would indicate a backing of the winds to the northwest, to make inquiry as to the probable progress of the storm. *O'Brien Bros., Inc.* v. *Director General of Railroads*, 287 Fed. 543, 544."

That case was affirmed in 118 Fed. (2nd) 45 (1941). The C. C. A. 2nd Circuit said at page 46:

"Moreover at or before 1:00 P. M. the Weather Bureau conveyed a second specific warning predicting a greater intensity of a wind already at 50 m. p. h. and a shift from north to northwest."

Also at page 46:

"* * * the warning at 11:00 A. M. of 'shifting gales,' 'winds of hurricane force' and 'north gales backing to northwest * * * today' should have moved it to reasonably prompt action."

In *The Johnson*, 1939 American Maritime Cases 526 (E. D. N. Y.), Judge Inch said with regard to this same storm (p. 529):

"Ample warnings of this violent storm had been given several times daily from September 17th to and including September 21st. Repeated attention was called to the hurricane's approach and the cor-

responding danger. The nearer the storm approached, the greater the danger."

In *New York Trap Rock* v. *Merritt Chapman,* 1941 American Maritime Case, 801 (E. D. N. Y.) Judge CAMPBELL said with regard to this same storm (p. 802):

> "Even casual observation of the storm warnings should have put the respondent on notice of an approaching tropical storm and the failure to make such observation is evidence of negligence. * * * Aside from such storm warnings, the hourly increase in the velocity of the wind must have caused any attentive mariner to expect a still further increase in the velocity of the wind."

In *The Salutation,* 239 Fed. 421 (S. D. N. Y.) (1916), it was held to be negligence to fail to make inquiry for the weather reports. Judge HOUGH said at page 425:

> "But there is one very old source of marine information which was consulted by the masters who have testified, viz. the barometer. The barometer had begun to fall on the 28th, and fell rapidly all the morning of March 1st. It is admitted that the glass had been going down to the knowledge of Captain Kniffen for nearly if not quite eighteen hours before he left Bridgeport; and when he left it was very low, and by the time he returned minus his tow it had reached a depression almost unexampled in the history of the Weather Bureau. * * * It therefore stands confessed that the 'Salutation' went out of Bridgeport harbor in intentional ignorance of anything and everything the Weather Bureau advised, in the expectation of a westerly storm, and in the face of a very low and long-falling barometer. The legal inquiry is whether such actions as this constitute reasonable prudence. In my opinion, even without the Weather Bureau warnings, the condition of the barometer and the acknowledged expectation of storm from the west were enough to render it

> proper to stay in port. But it was also negligence not even to inquire for the official weather reports."

In the *T. J. Hooper,* 53 Fed. (2nd) 107 (S. D. N. Y.) (aff. 60 Fed. [2] 737 cert. denied 287 U. S. 662), Judge Coxe said at page 109:

> "The question then arises whether the towage was negligently performed. The tugs were not insurers, but were required to use reasonable care and skill in the service they had undertaken. They were bound to respect barometer readings and weather indications; and for failure to do so are liable for resulting damage."

The obligation of a common carrier is much more onerous and stringent than that of a tower.

In the *Victoria,* 79 Fed. 122 (S. D. N. Y.) (1897) Judge Addison Brown said, page 123:

> "* * * I am satisfied that the tugs had abundant reason, through the cautionary signals that had been displayed, and from the signs of storm * * * to require them to examine the state of the weather * * *.
>
> "The testimony of the captains of the tugs indicates that they were not accustomed to pay attention to cautionary signals. If this is the practice, it must certainly be at their risk."

In *Maryland Transportation Co.* v. *Dempsey,* 279 Fed. 94, 97, the C. C. A. 4th (1921) said in a towage case where the liability was not that of a common carrier, that to start out when the barometer had been falling:

> "without so much as an inquiry as to the existence of storm signals, was of itself negligence"

citing *Doherty* v. *Pa. R. R.,* 269 Fed. 959, 963 (1920).

In the *Doherty* case at page 963 the C. C. A. 2nd said (following its own decision in *Nicholson* v. *Erie,* 255 Fed. 54):

"That the respondent was negligent in the instant cases and failed to exercise the care which a man of ordinary prudence would use under like conditions, seems to us evident * * *."

"The respondent's agents paid no attention to the signals of the Weather Bureau * * *."

In *McWilliams* v. *Davis*, 285 Fed. 312 (1922) (cert. denied 260 U. S. 747) the C. C. A. 2nd Circuit said at page 315:

"The tug masters working about the harbor are bound to take notice of warnings and protect their tows accordingly."

In the *New York Central No. 16*, 50 Fed. (2nd) 393, the C. C. A. 2nd Circuit said:

"The claimant prevailed in the District Court on the ground that the collision was the result of inevitable accident. If the failure of the No. 16 to observe and make ready for the approaching storm could be laid aside, we should be able to agree. * * * But the previous neglect of the No. 16 cannot be condoned. Although the evidence is overwhelming from witnesses, including an official weather observer, that the natural and usual indications which precede such a storm were multiplying around him, the Captain of the No. 16 saw none of them, heard none of them, and placed his tug and tow broadside to the wind. * * * He cannot be excused for such indifference to the storm warnings nature gives an observant navigator. * * *"

In *Nicholson* v. *Erie R. R.*, 255 Fed. 54 (1918) the C. C. A. 2nd Circuit said (Judge HOUGH) at page 55:

"It was some evidence of negligence that the navigators of respondent paid no attention to the official warnings of the northwest storm, which was the principal cause of libellants' damages. It is not held that mere failure to observe storm warnings or to obey them is conclusive proof of negligence;

> but it is evidence of a failure in that ordinary care and skill which is a master mariner's duty. In substance, we agree with the remarks on this subject contained in The Salutation (D. C.) 239 Fed. at page 423. The evidence herein shows that the testifying masters considered it no part of their duty either to observe or give weight to the Weather Bureau's advice. This was in error. We think such duty exists."

The Daily Records of the New York Office of the Weather Bureau for September 20, and September 21, 1938 (R. 214), graphically portray the fall of the barometer on September 20, and the rapid fall from ten A. M. September 21. This should, of itself have been a warning under the decisions, that the New York Harbor was in the danger area and the master of the tug *Transfer No. 20* should not have been left to act upon his own responsibility, unadvised as to these facts.

In the *Chehaw*, 54 Fed. (2nd) 645, 1931 (S. D. N. Y.), Judge WOOLSEY said:

> "Any tug which pits its own experience against the accumulated experience of other men and goes to sea in face of storm signals, does so at its own risk. But it may be exonerated by the event."

From the above cases, it is apparent that the decisions in the Second Circuit have always been in accord with the instant decision, except as to the fiction of jural personality of the tug (a fiction recently disapproved by this Court).

It was therefore the duty of the Pennsylvania Railroad and the New York, New Haven Railroad, as interstate rail carriers engaged in harbor lighterage on a large scale and for a long time, to maintain an adequate system of weather observation, and transmit such data to the various dispatchers' offices; so that the dispatchers and tug captains would keep themselves informed as to the hazards.

The defendant Railroads had no system of weather observation nor did they transmit any reports of the Weather Bureau or the character of the storm signals or the action of the barometer to the captains of the tugs or even to the dispatchers (R. 27, 31, 35, 49, 105, 109 and 122).

At page 11, petitioner says that the noon weather forecast in response to which the Weather Bureau hoisted hurricane flag signals, indicated that a tropical storm, central about 100 miles east of the Virginia Capes was moving rapidly northward attended by shifting gales—that this forecast said nothing about the hurricane's striking New York.

The noon forecast, September 21st, read (R. 214):

> "Change to whole gale warnings 11:30 AM Atlantic Coast north of Virginia Capes to Sandy Hook, N. J."

Sandy Hook is well known to be a part of New York Harbor. Furthermore this warning stated that the center of this storm was pursuing a course, which, if continued, would bring the storm center near New York Harbor.

Hurricanes in the latitude of New York have a diameter of several hundred miles, so that even though the center passed over Long Island, New York Harbor was bound to experience a gale force of wind.

The petition (pp. 5 and 12) also poses a question whether a tug, is to be charged with an "obsolete" or "current" forecast.

The petitioner again overlooks the many forecasts and warnings issued by the Weather Bureau during the preceding three days as well as during the day of the accident (R. 214) and overlooks the other facts in the case such as the storm warning signals flying from 7 A. M. to 6:30 P. M., the rapidly dropping barometer, and the wind velocity which had increased steadily through the morning until

it reached 60 miles per hour at the time the railroad tug started with respondent's goods to cross the harbor over the dangerous shoal flats (R. 214 and 437).

The "current" warnings were those distributed by the Local Office after it received from Washington the noon warning at 12 M. (R. 214). The "current" storm signal was the "whole gale" or "hurricane" signal flying from 12 M. until sometime after 2:15 P. M. (R. 138) when the tug left (R. 215, 6, 7), and the "current" barometer was the lowest that it had been since 1912 (R. 214, 133).

At page 19, the petition refers to the "hauling down of the Hurricane signals and substitution of Northwest storm signals at 2:15 P. M." In the first place, storm signals were continuously displayed throughout the day from 7 A. M. to 6:30 P. M. In the second place, the instructions from Washington to display "northwest" storm signals were *received* by the New York Office at 2:15 P. M. (R. 214) (at the moment the tug and carfloat started on the trip, as thrice found as a fact by the District Court, R. 215, 216 and 217). The position of the flagpole on the roof of the Weather Bureau Building at the Battery in New York, precludes the possibility of this change in signals until some time *after* 2:15 (R. 138) when the instructions were received and when the tug started its trip.

It is to be borne in mind that the "hurricane" center did not pass over New York Harbor but over eastern Long Island and that it was the heavy force of wind on its periphery (New York) which the petitioner encountered.

At page 20 the petition cites *The Bump,* 56 Fed. 2nd 203, E. D. N. Y. In that case the storm warning had been taken down and not replaced with another storm warning, whereas in the instant case, the storm warnings flew continuously from 7 A. M. to 6:30 P. M. (R. 214).

POINT III.

The railroad industry cannot now be in doubt as to its duty to avail itself of the free Weather Bureau service in order to be informed of forecasts of hazards to goods in transit, from unusual storms or hurricanes.

The Third Point of the petitioner (p. 20), is that this decision leaves the industry in doubt as to its rights and obligations, in that the *O'Brien* (*Headlight*) case, 300 Fed. 84 (C. C. A. 2) was overruled by the instant C. C. A. 2 decision in the following two respects:

(a) That under *The Headlight* decision, the owners of tugs need not apply to the Weather Bureau for *special* (private—unpublished) forecasts and that the only duty was to keep themselves acquainted with weather warnings publicly displayed.

In the instant case all the warnings were publicly displayed, and published.

In the instant case the C. C. A. 2 did not criticize the above rule. It only criticized the *O'Brien* (*Headlight*) case for its fiction as to jural personality of the tug.

(b) That *The Headlight* case held that a tug is not obliged to carry *or consult* a barometer (Petition, p. 22).

The Headlight case did hold that a tug need not "*carry*" a barometer but it did not hold that its owner, a railroad *engaged in transporting goods in interstate commerce,* was not obliged to *consult* a barometer on shore under impending dangerous storm indications.

In the instant decision the C. C. A. 2 has not held that the *tug* must carry a barometer. It merely said that the carrier (railroad owner) had no barometer at Greenville or anywhere else—a fault on the part of one engaged in such extensive maritime operations (R. 228).

In the instant case, the barometer dropped to the lowest since 1912 (R. 133).

The Headlight case (*supra*) involved not the liability of a common carrier for merchandise, but the liability of a tug owner for negligence in damaging a barge during shifting operations.

The Tug as a Jural Person.

At page 22 of its brief, petitioner criticizes the following statement of the Circuit Court of Appeals, in the instant case:

> "The fiction that in such a situation the liabilities are to be judged by treating the tug as a jural person has neither reason nor authority to commend it. *Pro tanta,* we therefore overrule *O'Brien Bros.* v. *Davis, Director General, supra* (300 Fed. Rep. 84)" (R. 226-7).

The petitioner argues that the Circuit Court of Appeals has not expressed the law correctly, but petitioner probably overlooks the case of *Consumers Import Co.* v. *Kabushiki Zosenjo,* decided Nov. 8, 1943 (Law Ed. Advance Opinions, 1943-1944, Vol. 88, p. 9) in which this Court said (p. 11):

> "It seems unnecessary * * * to review the historical development of the fiction that the ship for some purposes is treated as a jural personality apart from that of its owner."

And quoting from *The City of Norwich,* 118 U. S. 468, 502, this Court said that:

> " 'To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles.' The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age."

It would not encourage a railroad to act diligently if railroad cars were lightered on the basis of such a fiction. Nor would it raise a "stringent motive for the exercise of carefulness in his trust."

See

Railroad Co. v. *Lockwood* (*supra*).

If these railroads assumed, as petitioner states (p. 23) that they were under no obligation to obtain from the Weather Bureau and pass on to their employees, storm warnings, then it is high time that the Circuit Court of Appeals for the 2nd Circuit, should have expressed itself clearly to the contrary and thus brought itself in agreement with the law in the other Circuits. The record in this case shows that some carriers gave their name and telephone numbers to the Local Weather Bureau in order to enjoy the free service and warning advices afforded by the latter. The New Haven Railroad did nothing. Unfortunately, there may have been an impression that to avail itself of the advice given by the Weather Bureau and by a barometer might lead to liability, whereas ignorance might be a shield of immunity.

There is no conflict between the instant decision and the decisions of other Circuit Courts of Appeal, and no basis for the issuance of the Writ.

Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals, 2nd Circuit gave careful consideration to this case and wrote a painstaking and able opinion; whereas, the District Court had declined to consider briefs (R. 206) and wrote no opinion.

Writ Should Not Issue.

We respectfully submit that this Court will not issue the writ merely in order to enter into an elaborate discussion of one of the oldest established principles of the law of

common carriage, to wit: that the defense of Act of God is no excuse where negligence intervenes, and a discussion of whether the question of negligence can be examined by the Circuit Court of Appeals where, as here, the District Court has made no Finding of Fact as to negligence, and has treated the question as one of law, and the trial was a non-jury trial, had subsequent to 1938 when Rule 52 of the Rules of Civil Procedure adopting the equity practice, took effect.

Conclusion.

The petition itself, and the foregoing responsive brief, both show that the case presented makes no ground for the issuance of a writ of certiorari.

It is respectfully submitted that the petition should be dismissed.

BAILEY & MULLER,
Attorneys for Respondent.

THEODORE L. BAILEY and
JULIUS F. STEINBRENNER,
of Counsel.